





1 subsequently underwent surgery on her right shoulder. However, in August of  
2 2016, Plaintiff was terminated from her employment at BNSF due to a rules  
3 violation investigation that predated the accident. Plaintiff failed to keep up her  
4 conductor certifications and she was already on probationary status for a prior  
5 rule's violation. Plaintiff appealed her termination and the Public Law Board  
6 reinstated Plaintiff's employment February of 2019, but specifically finding that  
7 the Plaintiff was not entitled to lost wages during the time that she was  
8 terminated.  
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## 12 **II. Background**

13 Plaintiff provided BNSF with a notice of 30(b)(6) deposition on August  
14 14, 2020 seeking to take the deposition of a BNSF corporate representative on  
15 August 24<sup>th</sup>. On August 18 and August 19, the parties conferred through email  
16 regarding BNSF's objections to the 30(b)(6) deposition notice. The parties were  
17 unable to resolve the issues.  
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## 20 **III. Discussion**

21 BNSF's motion for a protective order is made under Fed.R.Civ.P.  
22 26(c)(1), which provides that a court, "may, for good cause, issue an order to  
23 protect a party or person from annoyance, embarrassment, oppression, or undue  
24 burden or expense, including one or more of the following:... (D) forbidding  
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1 inquiry into certain matters, or limiting the scope of disclosure or discovery to  
2 certain matters.” Rule 26(c)(1)(D).

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4 “A plaintiff has a duty to designate with specificity the issues to be  
5 addressed so that Defendants can adequately prepare its Rule 30(b)(6)  
6 designee.” *Cunningham v. Std. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 117304,  
7 \*22, 2008 WL 2668301 (D. Col. July 24, 2008). The party seeking the protective  
8 order has the burden of showing that good cause exists for such an order.  
9  
10 *Gambale v. Deutsche Bank AG*, 377 F.3d. 133, 142 (2d Cir. 2004). The court  
11 may limit a Rule 30(b)(6) deposition notice to the extent it requests the  
12 organization to designate an agent to testify on topics of information that are  
13 overly broad, vague, or ambiguous. *See, e.g., Scioneaux v. Elevating Boats,*  
14 *LLC*, No. 10-0133, 2010 U.S. Dist. LEXIS 120825, 2010 WL 4366417, at \*3  
15 (E.D. La. Oct. 20, 2010) (quashing deposition notice where the plaintiff failed  
16 to particularize the topics of discussion in Rule 30(b)(6) deposition notice); *In*  
17 *re Katrina Canal Breaches Consolidates Litigation*, No. 05-4182, 2008 WL  
18 4833023 (E.D. La. July 2, 2008) (granting motion for a protective order to the  
19 extent topics listed in a 30(b)(6) notice were overly broad, vague and  
20 ambiguous).

21 Rule 30(b)(6) depositions are designed to discover facts, not contentions  
22 or legal theories, which to the extent discoverable at all prior to trial, must be  
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1 discovered by other means. *U.S. ex. Rel. Baklid-Kunz v. Halifax Hosp. Medical*  
2 *Center*, 2012 WL 3527070 \*4-5 (M.D. Fla, 2012).  
3

4 **a. Plaintiff's use of the term "earning capacity" lacks reasonable**  
5 **particularity.**

6 The term "earning capacity" as applied to Plaintiff is ambiguous and  
7 vague, lacking the reasonable particularity required by Rule 30(b)(6).  
8

9 Plaintiff is seeking to have a corporate designee to testify about her  
10 capacity to earn the same amount as six other conductors at BNSF. This  
11 requested testimony is highly speculative, as an individual's earning capacity is  
12 entirely unique, fact specific and derived from a countless set of assumptions.  
13 Conductors at BNSF have a wide range in earning capacity that is not directly  
14 reflective of seniority. Gross pay varies based on jobs taken, availability, lack  
15 of medical issues that occur during a particular time period, FMLA leave,  
16 disciplinary actions resulting in suspension or termination, working different  
17 boards, working in a yard vs thru freight. The list is extensive and when asked  
18 to compare 7 individuals, the list of various factors and assumptions is  
19 multiplied.  
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23 By way of one example, BNSF has produced the earning records of three  
24 conductors above and below the Plaintiff on a seniority roster. *See Exhibit B.*  
25 These records reflect a vast disparity in salary despite what Plaintiff would lead  
26 the Court to believe is "similar levels of seniority." In 2019, the gross wages for  
27



1 these six employees was approximately \$151,000; \$128,000; \$128,000;  
2 \$75,000; \$66,000; and \$60,000. *Id.* Notably, the wages for each of these  
3 employees can change drastically from year to year. The individual who earned  
4 \$151,000 in 2019 earned \$98,000 in 2018. *Id.* Likewise, the individual that  
5 earned \$60,000 in 2019, earned \$87,000 in 2018. *Id.*

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8 There are numerous factors that account for this variance that would  
9 make BNSF's ability to testify regarding Plaintiff's "capacity" compared to  
10 these other workers incredibly speculative, including: (1) whether the  
11 individuals work the same territory; (2) whether they were also terminated  
12 during the time period as Plaintiff; (3) the individual disciplinary records; (4)  
13 whether the individuals work extra jobs that Plaintiff did not; (5) the  
14 individual's medical records; (6) past or present work restrictions; (7) did the  
15 employees have attendance issues or lay off personal with the same frequency  
16 as the Plaintiff, etc. The list of impacting factors is extensive, and it would be  
17 unduly burdensome to ask a designee to analyze what unique factors applied to  
18 all six of the other employees, and to then determine if Plaintiff's capacity  
19 would match theirs.

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22 Additionally, this form of testimony would require a corporate designee  
23 to examine each of the six employees' disciplinary or medical history to  
24 evaluate what impact such may have had on his or her wages. Even though  
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1 names are redacted, Plaintiff knows where people are on the seniority roster and  
2 this request forces BNSF to evaluate those confidential issues and then disclose  
3 them. This violates privacy laws including but not limited to HIPPA.  
4

5 Plaintiff chose not to retain an economist or a vocational expert. Such  
6 witnesses routinely analyzed these factors, make assumptions, apply those  
7 assumptions and then offer opinions as to earning capacity. Rule 30(b)(6) is not  
8 meant for a party to sidestep this process and require a corporation to designate  
9 a witness and render opinions on a topic that is not clearly defined with  
10 reasonable particularity  
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12  
13 **b. Plaintiff's requested testimony is redundant of previous discovery**  
14 **and represents an undue burden.**

15 As discussed, the variance in wages between individuals with similar  
16 seniority, and even between subsequent years for a specific individual, make it  
17 next to impossible for BNSF to offer evidence regarding Plaintiff's earning  
18 capacity outside of Plaintiff's personal pay records. BNSF's testimony  
19 regarding Plaintiff's earning capacity would likely be limited to pointing out  
20 Plaintiff's previous wage history, and the fact that she had attendance issues  
21 that could impact her earnings. This demonstrates the redundant nature of the  
22 proposed 30(b)(6) deposition, however, as BNSF has already produced  
23 Plaintiff's pay records for the ten years prior to her 2016 claim:  
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1                   **REQUEST FOR PRODUCTION NO. 24:** All pay records of Plaintiff  
2 kept by Defendant for the ten years prior to the Incident reflecting gross monthly  
3 and annual earnings and contributions to any 401(k) plan.  
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5                   **RESPONSE:** See **Exhibit 95** - Employee Monthly Earnings History,  
6 6/15/2011 - 1/10/2020 [BNSF (AGAN) 4896-4900].  
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8 **Exhibit C.** This previous production makes Plaintiff's request for testimony  
9 regarding her earning capacity redundant and creates an undue burden on  
10 BNSF.  
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12           Plaintiff has similarly requested that BNSF produce a corporate  
13 representative to testify regarding the wages for the three persons above and  
14 below Plaintiff on BNSF's seniority roster. **Exhibit A.** This issue is  
15 appropriately resolved through interrogatories, and in fact BNSF has  
16 specifically produced this information to Plaintiff. *See Exhibits B & C.*  
17 Notably, BNSF has not objected to the authenticity or foundation of these  
18 records, making the request to have a BNSF representative testify to this same  
19 subject redundant, and with no reasonable purpose but to cause an undue  
20 burden.<sup>1</sup>  
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25 <sup>1</sup> As additional evidence regarding the redundant nature of this testimony, in *Weber v. BNSF*,  
26 a companion case from Yellowstone County, BNSF likewise provided this information in  
27 discovery. The *Weber* case settled on the eve of trial in January of 2020. Plaintiff's counsel  
28 at no point requested a similar 30(b)(6) deposition regarding the Plaintiff's earning capacity,  
and made no allegations that the production of coworker earning records in discovery needed  
an additional 30(b)(6) deposition.



1 BNSF does not seek a protective order for designating someone who will  
2 testify that the earnings records for 6 other employees are what they say they  
3 are on the documents BNSF produced. Same for Plaintiff's wage history.  
4 However, since BNSF has also indicated that it does not object to these  
5 documents, doing a deposition is to lay such foundation is unduly burdensome.  
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### 8 CONCLUSION

9 Based on the foregoing, BNSF respectfully requests that the Court issue a  
10 protective order barring Plaintiff's proposed 30(b)(6) deposition as it lacks  
11 reasonable particularity and creates an undue burden on BNSF.  
12

13 DATED this 21<sup>st</sup> day of August 2020.

14 KNIGHT NICASTRO MACKAY, LLC  
15

16  
17 By: /s/ Steve Williams  
18 Anthony M. Nicastro  
19 Chad M. Knight  
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21 *Attorneys for Defendant*  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to D. Mont. Local Rule 7.1(d)(2)(E), I certify that Defendant's Brief in Support of Motion for Protective Order complies with the word limits set out in the rule. Excluding the caption, certificate of service and compliance, and based on the count provided by counsel's word processing system, Defendant's Brief in Support of Motion for Protective Order contains 1,412 words.

KNIGHT NICASTRO MACKAY, LLC

By: /s/ Steve Williams  
Steven T. Williams  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 21<sup>st</sup> day of August, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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